IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 17TH SEPTEMBER 2007 / 26TH BHADRA 1929

RSA.No. 1028 of 2003()

AS.51/2002 of I ADDL.DISTRICT COURT, ERNAKULAM
OS.1203/1997 of II ADDL.M.C., ERNAKULAM

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DEFENDANTS/APPELLANTS/APPELLANTS

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1. M/S.HOTEL MEGHA, BANERJI ROAD,
   ERNAKULAM A REGISTERED PARTNERSHIP FIRM.

2. M.J.THOMAS C/O. HOTEL MEGHA,
   PARTNER, M/S.HOTEL MEGHA, BANERJI ROAD,
   ERNAKULAM.

BY ADV. SRI.JOHNSON MANAYANI

PLAINTIFF/RESPONDENT/ RESPONDENT :

MR. P.K. ISSAC
AGED 62, S/O. LATE DR. P.V.KURIAN
RESIDING AT 3C PROVIDENCE GROVE,
THRIKKANARVATTOM DESOM, COCHIN-18
BY POWER OF ATTORNEY THE WIFE MARINA ISSAC,
AGED 49, D/O. K.P. KURIAN, RESIDING AT 4C,
PROVIDENCE GROVE, KOCHI-18

BY ADV. SRI.A.NANDAKUMAR

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 17/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A. NO. 1028 OF 2003

Dated this the 17th day of September, 2007

J U D G M E N T

Respondent instituted a suit against the appellants seeking a decree for mandatory injunction and prohibitory injunction contending that in violation of the Municipal Rules and without obtaining licence or permission, appellants constructed the building on the top of the compound wall of the respondent and they have no right to do so. A decree for mandatory injunction was sought. Respondent also sought a decree restraining the appellants from further construction.

2. Appellants resisted the suit contending that suit is barred under Section 563 of Kerala Municipalities Act and the suit is bad for non-joinder of Corporation of Cochin and no illegal construction has been made and therefore suit is to be dismissed. Learned Munsiff on the evidence of PWs 1 and 2, DW1 and Exts. A1 and A2 and C1 found that appellants made the disputed construction in violation of Kerala Building Rules and therefore granted a decree directing appellants to demolish the illegal

structure already constructed in the rear yard of the hotel of the first appellant and permitting respondent to remove the same in case appellants fail to do so. A decree for prohibitory injunction restraining any further unauthorised construction in the rear yard was also granted. Appellant challenged the decree and judgment before District Court, Ernakulam in A.S.51/2002. Learned Additional District Judge on reappreciation of evidence confirmed the findings of the learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Before admission notice was issued to the respondent. Learned counsel appearing for the appellants and the respondent were heard.

4. The argument of learned counsel appearing for appellants is that as admitted by PW1, before the institution of the suit respondent approached the Corporation by filing a petition complaining that construction on the rear yard of the building of the first appellant was in violation of the Kerala Building Rules and therefore Corporation has to take action for removal of the same. The Corporation has not taken any action and by the decree, respondent is trying to get an order or

direction which he could not get from the Corporation. It is also argued that the scope of the suit would come under the ambit of Section 563 of Kerala Municipalities rules and therefore the suit is not maintainable. Reliance was placed on the decision of this Court in **Noushad v. Kayamkulam Municipality** [2006 (2) KLT 319]. Learned counsel also argued that as respondent had already approached the Corporation, Corporation is a necessary party to the suit and no decree could be granted without the Corporation in the party array and the decree granted by courts below are not sustainable.

5. Learned counsel appearing for the respondent argued that in spite of opportunity granted, appellants did not produce any licence or permit authorising the construction, which was sought to be removed by the decree granted by the courts below, and on the evidence it was proved that construction was made in violation of the Rules and therefore the decree granted is sustainable. Learned counsel also pointed out that in the suit respondent did not seek any decree against the Corporation either for the action or the inaction as contemplated under Section 563 and therefore the suit is perfectly maintainable and

no substantial question of law is involved in the appeal.

6. Section 563 of the Kerala Municipalities Act 1994 provides that no civil court shall have jurisdiction to entertain any suit application or petition challenging the legality or propriety of any action taken by the authority or the Security under provisions comprised in Chapters 17, 18 and 19 or the Rules and Regulations made therein. Learned Single Judge in Naushad's case (Supra) has only interpreted the said section and held that it expressly bars entertaining of any suit by the civil court challenging the propriety or legality of any action taken by the authority or the security under the provisions in Chapter 17, 18 and 19 of the Act or the Rules and Regulations made therein. As rightly pointed out by the learned counsel appearing for the respondent and found by the courts below, in the suit respondent has not challenged either the legality or the propriety of any action or inaction of the Corporation so as to attract the bar provided under Section 563 of the Act. Therefore the suit or the decree is not barred as under Section 563 as canvased by the learned counsel.

7. Learned Munsiff as well as the learned Additional

District Judge on appreciation of evidence entered into a factual finding that the impugned construction was made by the appellants is in violation of Kerala Building Rules. Though appellants contended that the construction was legal and were effected after obtaining licence and plan, in spite of the opportunity, nothing was produced to establish that the construction was authorised. In such circumstances, the factual finding entered into by the courts below cannot be interfered.

In view of the that finding, the question whether civil court is competent to grant the decree is rightly found by the courts below. Under Section 9 of the Code of Civil Procedure, unless there is a bar either expressly or impliedly, civil court is competent to try the suit or grant the decree. In such circumstances, no substantial question of law is involved in the appeal.

Appeal fails and it is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

vps

K.R. UDAYABHANU, JUDGE

CRL.A. NOS.721/99 & 213/02

JUDGMENT

13TH SEPTEMBER, 2007

CRL.R.P.769/00

ORDER IN CRL.M.P. NO.4143/00 IN CRL.R.P.769/00

DISMISSED

13.9.07 SD/- **K.R. UDAYABHANU, JUDGE**

/TRUE COPY/

PA TO JUDGE.